Testimony of Ernest L. Stevens, Jr.
Chairman, National Indian Gaming Association

Concerning

A Draft Bill To Amend The Indian Gaming Regulatory Act
To Restrict Off-Reservation Gaming

Before

The House Committee on Resources
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National Indian Gaming Association

Good Afternoon, Chairman Pombo, Congressman Rahall, and Members of the Committee. My name is Ernest L. Stevens, Jr., and I am the Chairman of the National Indian Gaming Association (NIGA). Thank you for inviting me to testify today concerning the draft discussion bill to amend the Indian Gaming Regulatory Act ("IGRA") to restrict off-reservation gaming. I regret that due to other commitments, I cannot be there with you today to testify in person, so I am submitting written testimony. NIGA is an association of 184 Indian tribes dedicated to preserving Indian sovereignty and protecting Indian gaming as a means of generating tribal government revenue, building strong tribal governments, and rebuilding our Indian communities.

In my absence, I have asked Mark Van Norman, NIGA Executive Director, to testify on behalf of our intertribal association. Mr. Van Norman is a member of the Cheyenne River Sioux Tribe and prior to serving as NIGA's Executive Director, he served as Director of the Office of Tribal Justice in the U.S. Justice Department and as Tribal Attorney for his Tribe. He will be able to provide you with an overview of how IGRA has worked historically regarding gaming on lands acquired after 1988.

Indian Tribes Are Sovereign Governments

At the outset, it is always important to recall our origins. Before Columbus, Indian tribes were independent sovereign nations. Through treaty-making, Indian tribes were brought within the framework of the United States. In the earliest Indian treaties entered into during the Revolutionary War, the United States acknowledged the status of Indian tribes as sovereigns, guaranteed our original, inherent rights to self-government, and took Indian tribes under its protection. My own tribe, the Oneida Nation, assisted General Washington and his troops with food during the cold winters at Valley Forge.

The Constitution of the United States recognizes Indian tribes as governments, together with foreign nations and the several states, in the Commerce Clause. Through the Treaty Clause, the Constitution respects Indian sovereignty by ratifying the earliest Indian treaties entered into under the Articles of Confederation and charting the course for the hundreds of treaties and agreements entered into by the United States and Indian tribes on a government-to-government basis.

On September 23, 2004, President Bush issued an Executive Memorandum to the Heads of Executive Departments and Agencies, explaining:

> The United States has a unique legal and political relationship with Indian tribes and a special relationship with American Indian tribes and Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes. Presidents for decades have recognized this relationship…. My Administration is committed to continuing to work with federally recognized tribal governments on

a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States.

We thank you, Chairman Pombo and Members of the Committee, for working with tribal governments on a government-to-government basis and issuing a discussion draft of the bill on the important subject of amending the Indian Gaming Regulatory Act concerning off-reservation gaming. Tribal governments are looking forward to the opportunity to have a government-to-government dialogue on the bill before it is introduced in Congress.

Indian Gaming: The Native American Success Story

In the 18th and 19th Century, the United States destroyed traditional American Indian economies through warfare, genocide, dispossession and theft of lands. In an article entitled, "Exiles in Their Own Land (2004)," U.S. News and World Report explained that:

> The vast primeval forests that once blanketed the eastern United States were once home to millions of Indians. But starting in the 17th century, shiploads of European settlers arrived in superior numbers, bearing superior weapons. By 1830, war, genocide, and pestilence (diseases such as smallpox and measles to which the Indians had no immunity) had conspired to kill most Eastern Indians.

Throughout most of the 19th and 20th Century, our people endured poverty and social dislocation because of the destruction of traditional tribal economies. In *California v. Cabazon Band of Mission Indians and Morongo Band of Mission Indians* (1987), the Supreme Court acknowledged that Indian tribes in California were removed from their lush agricultural lands and seaside dwellings to rocky outcroppings at the edge of the desert. As the Court explained it, California Indians were left with reservations that "contain no natural resources which can be exploited."

Yet through these hardships, many generations of our grandmothers and grandfathers maintained our original, inherent right to tribal self-government. The Federal Government had a number of programs to promote economic development on Indian lands but few worked because of a lack of infrastructure, natural resources, and capital and remoteness from markets.

With little or no economy or tax base, tribal governments turned to Indian gaming in the late 1960s and 1970s. After several court battles, the Supreme Court agreed with the lower Federal courts: Indian gaming is crucial to tribal self-determination and self-government because it generates the general tribal government revenue needed to fund essential services. Over the ensuing decades, Indian tribes worked hard to develop Indian gaming as a means of generating tribal government revenue. Chairman Mark Macarro of the Pechanga Band of Lusieno Indians explains, "Indian gaming has enabled Tribes to begin the long march back from poverty and hopelessness towards prosperity and a better future for our people."

Today, Indian gaming is the Native American success story. Through Indian gaming in 2004, we estimate that tribal governments generated $18.5 billion in gross tribal government revenue. Naturally, tribal governments must pay substantial sums in wages and benefits – approximately $6 billion annually – as well as the cost of capital, facilities expenses, operation and maintenance, goods and services, and local service agreements before realizing net revenues.

Tribal governments use their net gaming revenues, first and foremost, to fund essential government services – education, health care, police and fire protection, water and sewer service, transportation, child and elder care – and to build basic community infrastructure, schools, hospitals, water systems, and roads.

Through the economic multiplier effect, Indian gaming generates more than 550,000 jobs. In addition, Indian gaming generates $5.5 billion in Federal revenue and $1.4 billion in Federal revenue savings through reduced welfare and unemployment payments. Tribal government gaming generates $1.8 billion in State revenue and an additional $100 million in local government revenue. And, tribal governments give generously to charitable causes – over $100 million annually.

The Indian Gaming Regulatory Act

The purposes of the Indian Gaming Regulatory Act are to promote strong tribal governments, economic development and self-sufficiency, and to establish a statutory basis to protect Indian gaming as a means of generating tribal government revenue. Through the use of the tribal-state compacting process and the exceptions to gaming on after acquired lands, IGRA was able to strike a delicate balance between the interests of the Tribes and States. Part of the original balance of state and tribal sovereign interests is reflected in Section 20 of the Act, concerning the use of lands acquired after 1988 to conduct Indian gaming.

Treatment of After Acquired Lands Pursuant to IGRA

IGRA establishes a general policy that Indian Tribes should only conduct gaming on lands held in trust by the United States prior to passage IGRA on October 17, 1988. 25 U.S.C. § 2719, with some exceptions. Congress accounted for historical circumstances such as diminished reservations, terminated Tribes, and Indian land claims, and established exceptions to provide for the use of “after acquired” lands in certain circumstances.

In addition, Congress established a process whereby Indian tribes may apply to acquire land in trust for gaming purposes to the Secretary of the Interior, and the Secretary then undertakes a consultation process with the State, local governments, and neighboring tribal governments. If the Secretary agrees that it is in the best interests of the Tribe and not adverse to the local community, the Secretary may approve the acquisition only with the concurrence of the State Governor.

Section 20 Two-Part Secretarial Consultation Process

As noted above, Section 20 of the Indian Gaming Regulatory Act provides that an Indian Tribe may apply to the Secretary to place land into trust for gaming purposes. The two-part determination process is significant. Upon application by a Tribe the Secretary of the Interior begins a review to make a determination of whether the acquisition of the land in trust for gaming purposes would be in the best interests of the Indian tribe. The Secretary must also consult with the local area government and neighboring Indian tribes to ensure that such acquisition "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).

We believe it is important for the Secretary to consult with local governments and neighboring Indian Tribes because the local community and Tribes in the area have an interest in the development of new gaming venues in their area. Certainly, local governments may be impacted by additional calls on their resources. Where the process has been successful, tribal governments have negotiated agreements with local governments to defray the cost of local government services and mitigate the impacts of gaming on the local community.

Neighboring Indian Tribes may also be impacted by new gaming venues, either through a market impact or concerns about overlapping aboriginal areas. In addition, we believe that it is important for the Secretary to consider whether the applicant Tribe has aboriginal or historical ties to the land sought. (If the Tribe does not have an aboriginal or historical connection to the area where the land is located, such applications can interfere with the aboriginal rights of other Tribes). Consultation can help to identify and address such concerns. The Secretary of the Interior has a trust responsibility to the neighboring Tribes as well as to the applicant Tribe and the interests of neighboring Tribes should be given appropriate consideration.

If the Secretary makes a determination favorable to the applicant Tribe, then the process turns to the Governor of the State in which the land is located. The Governor is consulted to ensure that the overall interests the State are considered, and the process will not move forward unless the Governor concurs with the Secretary's determination. The Governor's concurrence serves as a condition precedent to the use of "after acquired" lands for Indian gaming.

To date, only three Indian Tribes have successfully navigated the Section 20 two-part process: the Forest County Potawatomi Tribe in Milwaukee, Wisconsin, in 1990; the Kalispel Tribe in Spokane, Washington, in 1997; and the Keweenaw Bay Indian Community in Marquette, Michigan, in 2000.

A number of other Indian tribes have applied to the Secretary to have land taken into trust under Section 20's two part consultation process, but several of these applications have been rejected, including applications by:

Lac Courte Oreille
Red Cliff
Mole Lake
Jena Band of Choctaw

A number of applications to take land into trust under the two part consultation process are pending, according to the Department of Interior, including applications by:

Keweenaw Bay Indian Community
Bad River Band of Chippewa
Fort Mohave Tribe
Cayuga Indian Tribe
St. Regis Band of Mohawk
Stockbridge Munsee Community
Elk Valley Rancheria
Timbasha Shoshone
Menominee Indian Tribe
Delaware Tribe of Oklahoma
Tule River
Pueblo of Jemez

Land Within Reservation Areas and Contiguous Land – 2719(a)(1)

Recognizing the excessive loss of Indian lands and sporadic checker-board landholdings due to Removal and Allotment, Congress – through IGRA – permits Tribes to conduct gaming on lands within or contiguous to existing reservations. 25 U.S.C. § 2719(a)(1). These "contiguous" land acquisitions are generally not controversial. For example, the White Earth Ojibwe reservation was heavily checker-boarded by the loss of trust lands under the Allotment Policy, and without much fanfare, the White Earth Band reacquired a 61-acre parcel of land within its existing reservation area for gaming in 1995. Other Indian tribes that have utilized this section include:

Tunica-Biloxi Tribe
Coushatta Tribe
Saginaw Chippewa
Skokomish Tribe
Suquamish Tribe
Wyandotte Tribe
Cherokee Nation
Sisseton Wahpeton Sioux Tribe
Fort Sill Apache Tribe

Land Claim Settlements

IGRA permits gaming on Indian lands reaffirmed through a land settlement. 25 U.S.C. sec. 2719(b)(1)(B)(i). Under current law, where Indian lands were wrongfully

taken by the United States or a State and are restored through land settlement they, in essence, relate back in time to the original holding of the lands by the Tribe.

The Department of the Interior has required congressional approval of land claims under this section to comport with the Indian Non-Intercourse Act, 25 U.S.C. sec. 77, so the Department reports that to date no Indian tribe has utilized this section to conduct gaming on lands reacquired through a land claim settlement. The Department did recognize the right of the Seneca Nation of New York to utilize its separate congressional land settlement statute, codified at 25 U.S.C. section 1774, to place land into trust and the Secretary then acknowledged the Nation's right to conduct gaming on their lands.

Newly Acknowledged and Restored Tribes

In addition, the governmental status of a number of Tribes was wrongly terminated, either by Congress in direct acts of termination – or through wrongful Administrative termination by the Bureau of Indian Affairs and other agencies. Under current law, newly acknowledged and restored Tribes can conduct gaming on their initial reservations and restored lands.

For example, the Mohegan Tribe's land was taken into trust under the exception for the initial reservation for newly recognized tribes. 25 U.S.C. § 2719(b)(1)(B)(ii). Of course, the residents of Uncasville, Connecticut were well aware of the Tribe's historical status as a State-recognized Indian tribe and the status of their lands as a state Indian reservation.

The Grande Ronde Indian Community in Oregon was restored to recognition after termination, and in 1990, the Secretary acquired about five acres of land in trust pursuant to the exception for Tribes restored to recognition. 25 U.S.C. § 2719(b)(1)(B)(iii).

Other Indian tribes that have utilized these provisions include:

Siletz Tribe
Coquille Tribe
Klamath Tribes
Little River Band of Ottawa
Little Traverse Bay Bands
Paskenta Band of Nomlaki Indians
Pokagon Band of Potawatomie
United Auburn Indian Community
Nottawaseppi Huron Band of Potawatomi
Ponca Tribe
Little Traverse Bay Bands
Picayune Rancheria of Chukchansi Indians

Draft Bill to Amend IGRA to Restrict Off-Reservation Gaming: Summary

To amend IGRA to restrict off-reservation gaming, and for other purposes

Section 1. Restriction of off-reservation gaming.

(1) Section 20(b)(1) (25 U.S.C. §2719(b)(1)) of the Indian Gaming Regulatory Act is amended as follows:

"(b)(1) Subsection (a) (which generally prohibits gaming on lands acquired after October 17, 1988) will not apply to Indian Tribes –

(A) that are newly acknowledged (through the BAR process), if the Secretary determines that the Tribe's initial reservation is in the State of the Tribe's "primary geographic, social, and historical nexus"; or
(B) that are restored by legislation or other process, or are landless Tribes (as of the date of enactment of the bill) if –
    (i) the Secretary determines that the Tribe's initial reservation is in the State of the Tribe's "primary geographic, social, and historical nexus";
    (ii) the Secretary finds that gaming would be in the best interest of the Tribe and not detrimental to the surrounding community; and
    (iii) the State, city, county, town, parish, village and other political subdivisions of the State with authority over lands contiguous to the proposed reservation approve.

(2) Add at the end of Section 20 (25 U.S.C. §2719) the following new subsections:

"(e)(1) the Secretary may designate "2 Indian Economic Opportunity Zones" (IEOZ) to consolidate class II and class III gaming operations in each State, where at least one Tribe has its "primary geographic, social, and historical nexus to land within that State" – as follows:

(A) The Secretary will establish one IEOZ in each State on current Indian lands as of the date of enactment;
(B) The Secretary will establish one IEOZ in each State on off-reservation lands – taken "into trust for all of the Indian tribes participating in that Indian Economic Zone.

"(e)(2) A tribe may participate in a (1)(A) *on reservation* IEOZ if –

(A) the Secretary determines that participation is in the best interest of each participating tribe;
(B) the tribe for which the IEOZ lands are held in trust –
    (i) receives no benefit from gaming revenue of other tribes in the IEOZ, other than no more than 10% of gross revenues as a management fee to operate the facility; and
    (ii) provides no other financial support to any other participating Tribe
(C) the State, city, county, town, parish, village and other political subdivisions of the State with authority over lands contiguous to the proposed reservation approves;
(D) the tribe has no other ownership interest in another gaming facility on Indian lands.

"(e)(3) A tribe may participate in a (1)(B) *off-reservation* IEOZ if –

(A) the Secretary determines that participation is in the best interest of each tribe;

(B) the Secretary takes the lands within the IEOZ into trust for the benefit of each participating tribe;
(C) the State, city, county, town, parish, village and other political subdivisions of the State with authority over lands contiguous to the proposed reservation approves;
(D) each tribe that has its "primary geographic, social, and historical nexus" to land within 200 miles of the IEOZ approves; and
(E) the tribe has no other ownership interest in another gaming facility on Indian lands.

"(e)(4) The Secretary may approve gaming compacts with 2 or more tribes and the Governor of each State to carry out this subsection.

"(f) No tribe shall conduct gaming pursuant to IGRA on lands "outside of a State in which the Indian tribe has an existing reservation as of the date of enactment of this subsection, unless such lands are contiguous to an existing reservation of that Indian tribe in that State."

Section 2. Statutory construction.

These amendments shall be applied prospectively, and gaming compacts that were in effect on the date of enactment of this amendment will not be affected.

Analysis: ***The Draft Bill Would Amend IGRA Section 20***

The bill would replace current IGRA section 20(b)(1) (25 U.S.C. §2719(b)(1)) by altering treatment of the initial reservations of newly acknowledged, restored, and currently federally recognized but landless Tribes.

Section 20 Two-Part Secretarial Consultation Process

The bill would delete the two-part secretarial consultation process and nullify pending applications under Section 20(b)(1).

Newly Acknowledged and Restored Tribes

The bill would treat the initial reservations of newly acknowledged Tribes differently from those of legislatively restored and landless Tribes. A newly acknowledged Tribe would simply need the Secretary to determine that its initial reservation is "*within the State* where the Indian tribe has its primary geographic, social, and historical nexus to the land." (Emphasis added).

Legislatively restored and landless Tribes would need this same determination that the reservation is *within the State* where the tribe is primarily located. These Tribes would also have to undergo an expanded two-part determination process. Under the new process, the Secretary would determine whether the gaming activity is in the best interest of the Tribe and not detrimental to the surrounding community. Then, the Tribe would have to gain the approval of "the State, city, county, town, parish, village, and other … political subdivision of the State with authority over land that is … contiguous to" the newly acquired lands (the Tribe's initial reservation). Thus, the new provisions require affirmative local government approval. Local governments are subdivisions of, and

derive their authority from, the state, so in a sense this new provision has the effect of limiting authority at the state level. In addition, it is noteworthy that while current law provides for agreement by the Governor, similar to other Federal land acquisition statutes, see e.g., 16 U.S.C. sec. 715(f), the new provision references the "State," suggesting that state legislative action may be required to approve new Federal land acquisitions.

Reservation Area Lands and Contiguous Land: Landless Tribes – 2719(a)(1)

This provision appears to move the treatment of landless Tribes from Section 20(a) to amended Section 20 (b), and we are not certain whether this result is intended. Under current section 20(a), landless Tribes can conduct gaming on their initial reservation established after October 17, 1988, if the initial reservation is "within the tribe's last recognized reservation within the State or States within which the tribe is presently located." However, landless Tribes would have to meet the test set forth in amended Section 20(b), which requires that the Secretary find both that the initial reservation is within the State where the Tribe is primarily located and that gaming would benefit the Tribe. In addition, the State and local community would have to approve of gaming on the Tribe's initial reservation.

This new test is both positive and negative for landless Tribes. The location of their initial reservation would no longer be limited to land "within the tribe's last recognized reservation". As noted above, the initial reservation could be located anywhere in the State. However, in order to conduct gaming on that initial reservation, the Tribe would have to gain the approval of the State and the nearby local units of government.

Land Claim Settlements

The bill deletes the exception for gaming on lands taken into trust as part of a land claim settlement and seems to preclude the use of such lands for gaming purposes.

New Provisions for "Indian Economic Opportunity Zones"

The bill would also add new subsections (e) and (f) to Section 20 of IGRA. New subsection (e) would authorize the Secretary to establish two (2) "Indian Economic Opportunity Zones" (IEOZ) in each State with Indian gaming. Subsection (e)(1)(A) authorizes the Secretary to establish an IEOZ on a current reservation, and subsection (e)(1)(B) authorizes the Secretary to establish one IEOZ off-reservation, but within the same State.

For on-reservation IEOZs, Tribes may participate if: (1) the Secretary finds that such participation is in the best interests of all of the participating Tribes; (2) the host-Tribe receives no "funds related to the gaming activities" of other participating Tribes, other than no more than 10% of gross revenues as a management fee to operate the IEOZ facility;(3) the host-Tribe provides no financial support to any other participating Tribe;

(4) the State and contiguous units of local government approve of the IEOZ; and (5) the host-Tribe does not have an ownership interest in any other gaming facility on any other Indian lands. This provision will permit a Tribe to partner/host another Tribe or Tribes within the State on a separate gaming facility on the host-Tribe's reservation. However, the bill would place limits on what the host-Tribe can do on its reservation with that facility. It would also require the State and nearby units of local government to approve of the on-reservation partnership.

For off-reservation IEOZs, there would obviously be no host Tribe. The newly acquired land would be placed into trust for the benefit of all participating Tribes. The State and contiguous units of local government would have to approve of the off-reservation IEOZ. The off-reservation zone would also require the approval of Tribes located within 200 miles of the proposed site. No Tribe participating in the off-reservation IEOZ could have an ownership interest in another gaming facility on Indian lands – including its own current reservation.

Limitation on Gaming to State of Current Reservation

Finally, the bill would add a new subsection (f) would limit Tribes to gaming on lands in the State in which it is currently located, unless the Tribe currently has contiguous land located in more than one State, such as the Navajo Nation, Standing Rock Sioux Tribe, Sisseton Wahpeton Sioux Tribe, Colorado Indian Tribes, Washoe Indian Tribe, and the Duck Valley Shoshone Paiute Tribe.

Continued Viability of IGRA Section 20(a)

The bill seems to leave intact the exceptions contained in 25 USC § 2719(a), which permit gaming on lands acquired after Oct. 17, 1988 where: (1) such lands are "within or contiguous to" reservations that existed on October 17, 1988; (2) for landless Tribes in Oklahoma (as of Oct. 17, 1988), if the lands are within the boundaries of the Tribe's former reservation, as defined by the Secretary or are contiguous to other land held in trust by the U.S. for the Tribe in Oklahoma. However, it is unclear if landless Tribes not located in Oklahoma, would be subject to the new requirements of amended Section 20(b) as discussed above.

CONCLUSION

The Indian Gaming Regulatory Act has worked well to promote "tribal economic development, self-sufficiency, and strong tribal governments," as Congress intended, and as discussed above, Indian gaming is the Native American success story – and indeed, a true American success story for the Nation as a whole, as many Native Americans begin to see the promise of the American dream of a job, home ownership, and an economic future on the horizon. Naturally, any amendment to the Act is approached with caution because tribal governments need to protect our hard won gains in jobs, economic activity, community infrastructure, and government services. Thus, as the Committee's process

progresses, we ask that the Committee and Congress as a whole work to ensure that the integrity of the Act as a whole is protected.

The Indian Gaming Regulatory Act reflects a balance of Federal, state and tribal government interests. As President Bush recently affirmed, Indian tribes historically have dealt directly with the Federal Government on a government-to-government basis. Under IGRA, the States have a role in the compact negotiation process and the use of lands acquired after the Act for gaming purposes only because Congress developed unique processes for the accommodation of tribal and state sovereign interests. At the time of the Act's passage, many tribes – including the Red Lake Band of Chippewa and the Mescalero Apache Tribe who filed suit – objected to state involvement in Indian affairs because that is a role denied to them by the Constitution. The Supreme Court's 1996 decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ("Seminole") altered the original balance of IGRA by permitting the states to interpose an Eleventh Amendment defense to litigation to enforce its "good faith" requirements, so NIGA and our Member Tribes have traditionally requested that Congress enact a "Seminole Fix" in any amendment to IGRA to restore the original balance of the Act. The National Congress of Americans Indians has had the same position. NCAI Res. ABQ-03-029. We will ask our tribal government leaders to consider that issue as we go forward. Similarly, Tribal governments will need time to consider any amendment to the Act that would expand the existing role of state governments, so provisions requiring approval by state subdivisions for the use of Indian trust lands will be closely examined by tribal governments.

The National Indian Gaming Association provides a forum for tribal governments to come together to consider important issues concerning Indian gaming. We will work with the Chairman and the Committee to ensure that the draft bill is thoroughly reviewed and considered by tribal governments before it moves out of Committee. We will work with our Member Tribes to try to build common ground and we will work closely with the Committee and the Administration as the dialogue on the proposal progresses. We request that all concerned parties have a full and fair opportunity to be heard.

For our part, NIGA and the National Congress of American Indians will convene our NIGA/NCAI Task Force on Indian Gaming with meetings on March 24th, 2005 in Washington D.C., April 13 in San Diego, California and later, on May 25th at the Great Plain/Midwest Indian Gaming Conference in Minnesota to consider the draft bill. President Tex Hall of the National Congress of American Indians will co-chair the meetings with me, as we consider the important national issues that the bill represents. As an inter-tribal government organization, NIGA will develop an official position on the draft bill based upon the views of our elected tribal leaders through this series of Task Force meetings. Upon completion of our Joint Task Force meetings, I look forward to the opportunity to testify again before the Committee so that I may provide you with an overview of our Task Force meetings on the important topic of off-reservation gaming.

Mr. Chairman and Members of the Committee, this concludes my remarks. Once again, thank you for providing me with this opportunity to submit testimony.